



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Vista Scientific Corporation
File: B-231966.2
Date: December 27, 1988

DIGEST

1. Protest that agency requirement for a bumpless defrost system identified during negotiations exceeds agency's minimum needs is dismissed as untimely where not filed prior to the next closing date for receipt of proposals following the discussions.
2. Protester was not prejudiced by agency's failure to identify protester's defrost system in its original proposal as a deficiency where agency's desire for a bumpless defrost system was clearly spelled out during discussions and protester in fact revised its proposal to incorporate a bumpless system.
3. Where agency responds to issue raised by protester in its original letter of protest and protester does not attempt to rebut agency position in its comments, General Accounting Office will view issue as abandoned.
4. Agency's failure to notify unsuccessful offeror promptly after award is a procedural defect that does not affect the validity of the contract award.

DECISION

Vista Scientific Corporation protests the award to Mallory Engineering Inc. of a contract for the design and fabrication of mobile conditioning chambers under request for proposals (RFP) No. DAAD09-87-R-0020, issued by the United States Army Proving Ground, Dugway, Utah. The chambers, which are capable of simulating a wide range of climatic conditions, are used to test the effect of exposure to

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extreme heat or cold on various types of military equipment, such as artillery and rocket systems. The protester alleges that the Army requested proposal revisions that exceeded the agency's minimum requirements and that the agency evaluated its proposal and the awardee's against different technical requirements. We dismiss the protest in part and deny it in part.

The solicitation, as amended, contemplated the award of a firm-fixed-price contract for up to 10 chambers to the lowest-priced technically acceptable offeror. Six proposals were received by the closing date of August 5, 1987. The technical evaluation team determined that four of the six were technically unacceptable; the remaining two, those of Vista and Mallory, were found to be susceptible of being made acceptable. The contracting officer asked both offerors to submit additional clarifying information on a wide range of aspects of their proposals. Upon receipt of the additional information from both offerors, the technical evaluators determined that both offerors met the RFP's basic requirements.

At this point, however, agency technical personnel concluded that the RFP specifications did not clearly reflect the government's minimum requirements. In particular, the specification describing the cascade refrigeration system to be used to cool the chambers did not explicitly require that the system be capable of "bumpless" defrosting, i.e., that there be no increase in coil temperature during defrosting. Since the requirement for a bumpless defrost system had not been clearly stated in the specification describing the refrigeration system--although, according to the agency, the requirement was implicit in another section of the specification, which required that the refrigeration system be capable of automatically maintaining any selected temperature within a tolerance of plus or minus 1 degree F.--the agency decided that Vista should be given an opportunity to revise its proposal to incorporate a bumpless system. The technical evaluators also concluded that although the hot gas type defrost system which the protester offered was not precluded by the specification, it represented an unnecessarily high risk approach. Finally, the agency concluded that the specification should have stated that the chambers must perform using only 200 ampere electric service.

By letter dated November 10, the contracting officer informed Vista that the chambers must contain an automatic, "essentially" bumpless defrost system; he further advised that the hot gas type defrost system had been shown to be undesirable in this application. The contracting officer requested an alternate defrost system that would maintain

the required temperature and airflow conditions within the chamber. Since Mallory had offered a bumpless defrost system which did not use hot gas in its original proposal, the agency's letter to it did not refer to the defrost system. In view of the fact that both Vista and Mallory proposed chambers requiring 400 ampere service, both were advised by the November 10 letter to revise their proposals to reduce the electrical requirement while minimizing deviations from their original proposals.

Vista responded to the agency's request for revisions by proposing a bumpless electric defrost system and revising the electrical requirements of its equipment so that it would not exceed 200 amperes by the use of interlocking controls to prevent simultaneous operation of low temperature and high temperature components. Mallory responded to the 200 ampere requirement by proposing to eliminate one of the compartment heaters and by downsizing several other components. Both revised proposals were found to be acceptable. After a subsequent request for current cost information, Mallory was awarded the contract at its low total price of \$1,703.445. Vista's price was \$1,718.767.

Vista argues first that the requirement for a bumpless defrost system exceeds the agency's minimum needs and that the agency's request for an alternative to its hot gas defrost system was restrictive of competition.

We will not consider this ground of protest since it is untimely. Our Bid Protest Regulations provide that to be timely, a protest of an alleged impropriety incorporated into a solicitation must be filed before the next closing date for receipt of proposals following the incorporation. 4 C.F.R. § 21.2(a)(1) (1988); Interstate Diesel Services, Inc., B-232668.2, Oct. 28, 1988, 88-2 CPD ¶ 408. Vista did not protest the requirement for the bumpless defrost system prior to the next closing date after it was advised of the agency's wishes in the November 10 letter; rather, it amended its proposal to satisfy the agency's request.

Vista contends that its protest on this issue is timely since it was filed within 10 working days after it learned that Mallory had originally proposed a bumpless system and had therefore not been required to amend its proposal in this regard. We do not see the relevance of this information for purposes of determining the timeliness of Vista's protest against the specifications. Vista's argument is that the requirement for a bumpless defrost system using other than hot gas exceeded the agency's minimum requirements and was restrictive of competition; whether Mallory's proposal needed to be amended or not to satisfy this

requirement has no bearing on this issue. If Vista had wished to object to the bumpless requirement, it should have done so prior to the December 9 closing date established in the agency's November 10 letter rather than amending its proposal to incorporate the change requested by the government. We dismiss this issue.

Vista also argues that if the need for a bumpless type defrost system was actually inherent in the RFP specification which stated that the refrigeration system must be capable of maintaining any selected temperature within a tolerance of plus or minus 1 degree F., as the Army contends in its protest report, then the agency should have identified Vista's failure to offer such a system in its original proposal as a deficiency during discussions.

We fail to understand how the protester was prejudiced by the agency's failure to label its originally proposed defrost system as deficient given that the agency spelled out for the protester in its letter of November 10 precisely the sort of defrost system that it wanted and gave the protester an opportunity to revise its proposal, which the protester did, without complaint. Vista contends that even though it was given an opportunity to revise its proposal to meet the agency's requirements, it was prejudiced because if it had known that its original system was deficient, it "might" have priced its new design differently since it would have recognized the possibility that the designs offered by its competitors might not have contained this deficiency.

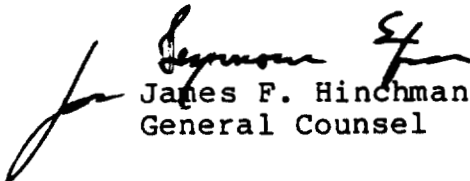
We do not find the assertion that the protester "might" have priced its proposal differently to be sufficient to show prejudice, particularly given that the protester was unaware of the prices offered by its competitors and had no way of knowing what, if any, revisions had been required in their proposals. We therefore see no reason to believe that it would have altered its pricing strategy if it had been told that its original proposal was deficient. We deny this aspect of the protest.

Vista further argued in its original protest letter that its proposal and Mallory's were not evaluated against the same technical requirements. The protester's argument appears to be based on the assertion that Mallory was permitted to decrease the performance of its chambers to the point where they no longer satisfied the agency's minimum requirements. Mallory decreased the performance, according to the protester, in order to reduce the electrical demand to below 200 amperes while Vista proposed a solution without degrading the system's performance.

In its report, the agency responded to this allegation by denying that the two offerors had been evaluated against different technical requirements and pointing out that it had informed the offerors in the November 10 letters sent to both that possible methods of reducing the chambers' electrical demand included deleting or downsizing certain equipment. Vista, in commenting on the agency report, did not take exception to the agency's explanation or attempt to rebut it. Hence, we consider the protester to have abandoned the issue and we will not consider it. PacOrd, Inc., B-224249, Jan. 5, 1987, 87-1 CPD ¶ 7.

Finally, the protester complains that the contracting officer violated Federal Acquisition Regulation (FAR) § 15.1001(a) by failing to notify it promptly that its proposal had not been selected for award. Vista contends that by failing to inform it of the award within 10 days of the award date, the contracting officer denied it the opportunity to invoke the stay provisions of the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(d) (Supp. IV 1986). While agencies are required to provide prompt notice of contract awards, we generally view tardiness in notifying unsuccessful offerors as a procedural defect that does not affect the validity of the contract award. Paul G. Koukoulas, et al., B-229650, et al., Mar. 16, 1988, 88-1 CPD ¶ 278. In any event, since there is no merit to the protest, Vista was not harmed by the late notice.

The protest is dismissed in part and denied in part.


James F. Hinchman
General Counsel